

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENNIS M. DEXTER
Claimant

VS.

ATCHISON CASTING CORPORATION
Respondent

AND

AMERICAN HOME ASSURANCE COMPANY
Insurance Carrier

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Docket No. 1,028,324

ORDER

Claimant appeals the October 4, 2006 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits for two scheduled injuries, a 16 percent impairment to the right upper extremity at the level of the shoulder and a 10 percent left lower extremity impairment at the level of the lower leg. The Appeals Board (Board) heard oral argument on December 20, 2006.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew S. Crowley of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). At oral argument to the Board, the parties stipulated that the mathematical computations utilized by the ALJ in the Award were inaccurate. If the Board determines the Award should be affirmed, the mathematical calculations will be corrected.

ISSUES

1. Should the Board take judicial notice of the *AMA Guides*?¹
2. What is the nature and extent of claimant's injury and disability? More particularly, is claimant entitled to an award for two scheduled injuries, or is claimant entitled to an award based upon a permanent partial general disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 22 percent permanent partial disability to the right upper extremity on a functional basis at the level of the shoulder and a 10 percent permanent partial disability on a functional basis at the level of the left lower leg. Claimant's request that the Board take official notice of the *AMA Guides* in its entirety is denied. The Board has determined this issue in earlier decisions and is presented with no new argument or authority in this matter that would persuade the Board to change its position on the issue.²

Claimant, a long-term employee of respondent, suffered accidental injury on October 15, 2004, when, while yanking a hose, he felt a pop in his right shoulder. He experienced immediate and severe pain in the shoulder. Claimant ultimately came under the care of orthopedic surgeon Thomas L. Shriwise, M.D. The first examination was on February 1, 2005, at which time Dr. Shriwise recommended a subacromial decompression and an ulnar nerve transfer. This surgery, which is performed with the patient in a seated position, resulted in claimant waking up from the surgery with pain in his left upper leg and calf. Also, his left foot would stick straight down, a condition called "drop foot". The drop foot condition went away in two to three days, but the problems with claimant's foot, including numbness from the toes to about halfway back to his foot, remained as of the regular hearing. Claimant also experienced tingling and occasional foot cramps. Claimant initially experienced hip pain, but the use of orthotics greatly lessened the hip pain.

After the surgery, claimant's shoulder was sore. It occasionally burns, pops and cracks. Claimant also experiences numbness in the right elbow, at the site where the doctor moved the nerve from the groove into his forearm. This was done to eliminate the nerve irritation.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

² *Heller v. Conagra Foods*, No. 1,012,453, 2006 WL 1933429 (Kan. WCAB June 30, 2006).

Dr. Shriwise provided no restrictions to claimant's upper extremity at the elbow and the shoulder. When asked why no restrictions, he commented that claimant had returned to his regular duties by the time claimant was finally rated and was tolerating the work well. So the doctor elected to give claimant no restrictions. He also provided no restrictions for the lower extremity as the orthotics had helped the hip pain. The only remaining pain was in claimant's foot from the ball of his foot towards claimant's toes. Claimant did contact the doctor's office regarding the use of Naproxen, which would help with the foot discomfort. Dr. Shriwise rated claimant at 5 to 11 percent impairment for the left leg. When asked, Dr. Shriwise agreed that the 10 percent lower extremity rating provided by Dr. Prostic was appropriate.

Dr. Shriwise initially rated claimant at 5 to 6 percent impairment to the right upper extremity. However, when questioned on cross-examination, he agreed the rating could be changed to a 22 percent upper extremity rating. This would include a 10 percent rating for the surgery related to the ulnar nerve entrapment, a 10 percent upper extremity rating for the distal clavicle excision and 4 percent for range of motion loss. When respondent's attorney attempted to persuade the doctor to return to the original lower rating, Dr. Shriwise refused, commenting that a proper reading of the *Guides* resulted in the higher rating. Dr. Shriwise stated that he "would be willing to alter it up to the level of 22 percent"³ All of Dr. Shriwise's ratings were pursuant to the *AMA Guides*.

Claimant was referred by claimant's attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on July 17, 2006. Claimant complained of continued soreness in the shoulder. Dr. Prostic found claimant to have a 16 percent impairment to the right upper extremity as the result of the surgeries. He also rated claimant at 10 percent to the left lower extremity, noting that claimant complained of foot cramping and pain in his foot, accompanied by foot weakness. There was no mention in Dr. Prostic's July 17, 2006 report of any hip pain, although Dr. Prostic was aware of the problems associated with claimant's hip and the resulting sciatic nerve pain after the surgery. Dr. Prostic noted that the damage to claimant's hip was in the area of the sciatic nerve, with the residual problems being in claimant's foot and calf. Dr. Prostic also elected to place no restrictions on claimant, noting that claimant had returned to his regular job, and there was no reason for any restrictions.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.⁴

³ Shriwise Depo. at 26.

⁴ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁶

Both Dr. Prostic and Dr. Shriwise found claimant to have suffered a 10 percent functional impairment to the left lower extremity. While claimant argues that a rating to the hip would be more appropriate, the medical evidence in this record does not support that finding. Neither doctor initially rated claimant's hip. In fact, Dr. Prostic's report of July 17, 2006, makes no mention of ongoing hip complaints. While Dr. Prostic does discuss sciatic nerve irritation, the residuals of that injury are in the foot and calf. The Board, therefore, restricts claimant's award in this matter to the left lower extremity. It is the situs of the resulting disability, and not the situs of the trauma, which determines the benefits available.⁷ Thus, as this injury involves two extremities, claimant's entitlement to an award is limited to two scheduled injuries under K.S.A. 44-510d.⁸

The Board's findings and conclusions are based upon the record presented and the unusual facts of this case. Generally, the situs of a nerve compression or irritation resulting in radiculopathy would be found to be an injury at the situs of the nerve compression rather than where the symptoms manifest themselves. This would be particularly true when the physicians impose restrictions to protect the injured area. But in this case both physicians rated claimant's sciatica as an impairment of the leg and neither physician recommended any restrictions for that condition. Accordingly, the Board cannot find claimant has any disability to his spine, hip or low back. Thus, his disability is to the leg, not the body as a whole. Claimant has a scheduled injury, not a general body disability.

Respondent argues the upper extremity rating should be based upon Dr. Shriwise's original rating of 5 to 6 percent to the upper extremity, and not the 22 percent rating

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-510e(a).

⁷ *Bryant v. Excel Corp.*, 239 Kan 688, 722 P.2d 579 (1984); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

⁸ *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

ultimately determined by Dr. Shriwise to be appropriate. The ALJ agreed, finding that Dr. Shriwise had been misled by claimant's counsel into suggesting a higher rating by considering a portion of the AMA *Guides* which does not relate to the upper extremity. The Board agrees that section 3.3d applies to injuries to the spine and would not be appropriate in determining upper extremity injury ratings. However, the sections discussed by Dr. Shriwise, when reaching his ultimate opinion about claimant's upper extremity impairment, included pages 3/61 and 3/62, Table 27, and page 3/57, Table 16, of the fourth edition of the AMA *Guides*,⁹ all of which relate to the upper extremities. The Board finds the 22 percent upper extremity functional impairment opinion of Dr. Shriwise to be the most credible and adopts same for the purpose of this award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated October 4, 2006, should be, and is hereby, modified to award claimant a 22 percent functional disability to the right upper extremity and a 10 percent functional disability to the left lower extremity.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Atchison Casting Corporation, and its insurance carrier, American Home Assurance Company, for an accidental injury which occurred on October 15, 2004, and based upon an average weekly wage sufficient for the maximum weekly benefit as stipulated by the parties, for 2.69 weeks of temporary total disability compensation at the rate of \$449.00 per week or \$1,207.85, followed by 19 weeks at the rate of \$449.00 per week or \$8,531.00 for a 10 percent permanent partial disability to the left lower extremity, followed by 48.91 weeks at the rate of \$449.00 per week totaling \$21,960.59 for a 22 percent permanent partial disability to the right upper extremity, making a total award of \$31,699.44.

As of the date of this award, the entire amount is due and owing and payable in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

⁹ Shriwise Depo. at 21-22.

Dated this ____ day of February, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge